

'CHINA MAIL' OFFICE

Washington, April 3, 1944.

1997

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WEDNESDAY, APRIL 23, 1896.

LAWN TENNIS TOURNAMENT.

The following ties were played off this afternoon:—

A. OLSEN SINGLE HANDICAP.

Captain Dyer (Scratch) beat B. Allison (Scratch)—1-6, 6-2, 6-1.

PROFESSIONAL PAIRS—3RD TIE.

T. Sorcombe Smith and J. M. Atkinson (Civil Service) beat K. W. Mounsey and E. J. Gist (Lawyers)—6-1, 6-4.

SUPREME COURT.

IN APPELLATE JURISDICTION.

(Before His Honor Mr. W. M. Goodman, Acting Chief Justice, and His Honor Mr. T. Sorcombe Smith, Acting Justice.)

Wednesday, April 23.

THE MILK ADULTERATION APPEAL.

John Kennedy, dairy keeper, appealed for a rehearing of the case in which he was convicted at the Magistrate's Court of adulterating a quantity of milk sold by him.

Mr. J. J. Francis, Q.C., appeared on behalf of the appellants, and Mr. H. L. Deane, J., appeared for the respondent, instructed by Mr. A. B. Johnson.

Mr. Francis opened the case. He said there was a distinct statement on evidence that the milk in question was not unwholesome or unfit for use as required by the Ordinance on the ground that the conviction was obtained. The only evidence was that the milk was adulterated by the addition of six per cent. of water. Now, there was no definition of the word "adulterated" in any case in which a definition was given of the word adulterated as applied to milk. He was proceeding to give the collection in which the word was found in the Ordinance, when

Mr. Pollock said this was hardly material to a question of fact.

Mr. Francis said it was a mixed case of law and fact.

The Chief Justice—The addition of water would be adulteration.

Mr. Francis—But it would not be tainted or unfit for use unless there was something noxious added to the milk.

The Chief Justice—It should hold as a matter of course that it was adulterated.

In arguing whether the addition of water to milk is adulteration you are arguing on a point of law.

Mr. Francis, having drawn the attention of the Court to the fact that the Ordinance, Section 3, said: "The first objection in this case was that no evidence was given by the only expert witness examined or any other person as to what is the standard for milk."

The witness came forward and says he has found 80 per cent. of water in the milk. He gives it as his opinion that the milk is adulterated. He admits that he has not analysed or examined the milk given by cows kept in Hongkong and fed on the food that is available here. He states that he made one examination, and that he made no general examination of the milk in the Colony.

The Chief Justice—I do not think he says he never analysed any other milk in the Colony. I read the depositions carefully, and I do not recollect that. Will you show me the passage?

Mr. Francis—Allow me to state the case, and then I will refer to the evidence. There is absolutely no evidence as to what is the standard of milk anywhere—no evidence to enable the Magistrate to form for himself an opinion as to whether the water had been added and no evidence as to the constituent parts of milk in its normal condition and to what extent the water existed in the milk. The evidence on which the Magistrate was based was a decision by Judge Hawkins pointing out that there were variations in the standard of milk. The Magistrate might adopt one standard and the other. The Magistrate was given a general average of analyses certificates, and that was before them in an authoritative form. In Hongkong, however, no certificates were required; there were none of the common sense details required of the prosecution. The Ordinance was the simplest and best form, that, on evidence, adulteration shall be punished by such and such a fine. If the added ingredient had been a substance not generally found in milk, say 6 per cent. of chalk, the evidence of the analyst would be conclusive. If he said he had found 70 per cent. of water that was not conclusive unless in the evidence the Magistrate had before him some opinion showing what ought to be the proper or normal percentage of water in pure milk. If the analyst's opinion were to be taken it would be the Magistrate and the witness who would be the judge of the case. The Chief Justice—Don't you think the opinion of the public analyst is of more value than that of the Magistrate?

Mr. Francis—I should think so, but, unfortunately, the opinion of the superior Courts is different.

The Chief Justice—Here you have an independent Commission appointed by the Government. There is nothing unusual or unfair in making his certificate *prima facie* evidence.

Mr. Francis—But the law has not made that evidence in Hongkong.

The Chief Justice—If you have one trustworthy expert on one side, and no other expert witness is called against him.

Mr. Francis—Your Lordship knows the usual phrase in regard to expert witnesses.

The Chief Justice—That is when you are paid on the different sides. In this case the expert is paid by the Government. The object of a number of experts was to make the claims against the Government as large as possible.

Mr. Francis—And the object of others was to make the claims as small as possible and thus save the pocket of the Government.

The Chief Justice—In the case of the Tapinghams it would have been much better to have had one unbiased man to give expert evidence, and that is what has been done in this case.

Mr. Francis—These limits are extremely wide. He then went on to say he was applying for a rehearing so that further evidence might be given before the Magistrate to enable the Magistrate to come to a decision. The defendant was prepared to offer any amount of evidence that the respondent standard in England for the per-

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The Chief Justice—Of course, it will make out the standard in favour of the dairyman.

Mr. Francis—I am asking for a rehearing, and I am stating that we have evidence, and show there has been a mistake.

The Chief Justice—I do not know that I will grant a rehearing. The appellant was represented at the Magistrate by a very able solicitor and had abundant opportunity of bringing forward evidence to show there had been no adulteration.

Mr. Francis—And that Solicitor—a very able one as your Lordship says—was of opinion that the evidence put before the Magistrate that there was no adulteration ought to have outweighed Mr. Crow's evidence.

The Chief Justice—I do not say that some hypothetical case might be made out, but it is a great temptation to perjury to reopen a case. What we have to decide now is whether the decision the Magistrate arrived at on the facts before him was a right and proper decision or whether it was wrong, and whether we should grant a rehearing.

Mr. Francis—I submit that it is not quite the case. If the Court is satisfied or has reason to believe there has been a gross miscarriage of justice, your Lordship would grant a rehearing. The evidence was prepared to put before the Magistrate a quantity of water in the average range of 81 to 91; that the average total solids found in milk—the result of investigations carried on in Hongkong and in America and in England—22.0/100 cases—amounted to 18.6, and that these may vary from 7.2 to 18.9.

Mr. Pollock—My learned friend is going outside the point whether the Magistrate was right in coming to a decision on the evidence before him.

The Chief Justice—Yes; if you had not had an opportunity of calling evidence before the Magistrate, it would have been a different matter.

Mr. Francis pointed out that there was no provision under the Hongkong Ordinance, as in the English Act, by which the party selling the milk was provided with a sample from the same bottle for an independent analysis.

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Mr. Francis said they could not compel Mr. Crow to provide them with an analysis, but the Chief Justice said it was not likely that Mr. Crow would refuse if he were asked. Mr. Francis then proceeded to read opinions by scientific experts on the standard of quality in milk. He also read over Mr. Crow's evidence and called the attention of the Court to certain points. He said that the evidence on which Mr. Crow advanced the opinion that the milk was pure was that he had analysed the milk. The Chief Justice—I do not know that there is no evidence to show that he never analysed other milk in the Colony. I have reason to believe he has. Unless he says he has not I cannot take it for granted that he knows nothing about Hongkong milk.

After a considerable amount of discussion between Mr. Francis and the bench, the Chief Justice said: "I do not think I will give judgment in this case at once. It seems that the appellant, Mr. Kennedy, was convicted before the Magistrate after a careful hearing on the 1st and 2nd of April on a charge of having sold adulterated food for man. Now by the 5th Section of the Ordinance of 23 of 1890 the words 'food for man' are defined to include every article of food or drink other than drugs or water, and the question is whether Mr. Kennedy was rightly convicted of having sold water which was adulterated by having water added to it. The evidence on which the Magistrate came to his conclusion is that there were variations in the standard of milk. The Magistrate might adopt one standard and the other. The Magistrate was given a general average of analyses certificates, and that was before them in an authoritative form. In Hongkong, however, no certificates were required; there were none of the common sense details required of the prosecution. The Ordinance was the simplest and best form, that, on evidence, adulteration shall be punished by such and such a fine. If the added ingredient had been a substance not generally found in milk, say 6 per cent. of chalk, the evidence of the analyst would be conclusive. If he said he had found 70 per cent. of water that was not conclusive unless in the evidence the Magistrate had before him some opinion showing what ought to be the proper or normal percentage of water in pure milk. If the analyst's opinion were to be taken it would be the Magistrate and the witness who would be the judge of the case. The Chief Justice—Don't you think the opinion of the public analyst is of more value than that of the Magistrate?

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